Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1723

KERMIT G. HEISE,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The Memorandum Opinion of the Appellate Department of the Superior Court of the State of California, for the County of San Diego, is unreported and is printed in Appendix A of Petitioner's Brief at pages 13-14. The decision of the Court of Appeal, State of California, Fourth Appellate District, Division One, is unreported and is printed in Appendix A of Petitioner's Brief at page 15.

QUESTIONS PRESENTED

The Petitioner presents two questions. First, did the trial court err in denying petitioner's motion to discover the contents of the District Attorney's "Jury Book"? Second, did the trial court's denial of a single voir dire question posed by petitioner's counsel deny the petitioner a fair and impartial trial?

STATEMENT OF THE CASE

On October 21, 1975, a complaint was filed in the Municipal Court, El Cajon Judicial District, County of San Diego, State of California, charging KERMIT GEORGE HEISE, defendant and petitioner (hereinafter referred to as "petitioner"), in Count One with a violation of California Vehicle Code Section 23102(a) (Driving While Under the Influence of An Intoxicating Liquor or Any Drug). Petitioner was arraigned on said complaint and entered a not guilty plea. A jury trial was set for December 23, 1975.

On December 22, 1975, the petitioner, through his counsel, made a motion for discovery of the District Attorney's "Jury Book." The petitioner and the People of the State of California (hereinafter referred to as "respondent") stipulated that the motion which was made by petitioner be upon the points and authorities, the respondent's response thereto, and the record in the case of *People of the State of California v. Lynn Orla Simpson* (El Cajon Municipal Court, No. T-395820). Upon hearing the petitioner's motion was denied.

On December 23, 1975, the case of *People of the State of California v. Kermit G. Heise* came on for trial. Petitioner

was represented by counsel. Voir dire examination was commenced and concluded on this date.

On December 24, 1975, at the commencement of the proceedings, the petitioner made a motion for discovery which was denied by the presiding trial judge as being untimely, improperly submitted, and vague. The trial of the instant case thereafter proceeded with the presentation of evidence. At the conclusion of respondent's evidence, respondent rested and the petitioner made an opening statement and began to present evidence. The court thereafter recessed until December 26, 1975.

On December 26, 1975, the presentation of the petitioner's case continued and was concluded. The respondent presented a rebuttal witness. Both parties rested and arguments were had. The jury was instructed by the court and retired for deliberation.

On December 29, 1975, the jury returned to continue deliberations at 9:00 a.m. The jury returned with a verdict at 9:55 a.m., finding the petitioner guilty of a violation of California Vehicle Code Section 23102(a). The defendant waived time and a probation report was ordered by the court.

On Janaury 20, 1976, the petitioner was present with counsel and was sentenced by the court. Thereafter, petitioner pursued the instant case on appeal.

On April 8, 1976, a hearing on the Settled Statement of Facts on Appeal was had in the chambers of the trial judge with counsel for petitioner and respondent being present. The Settled Statement of Facts on Appeal was determined at the conclusion of said hearing.

The instant case was transferred to the Appellate Division of the Superior Court of the State of California, for the County of San Diego, which upheld the conviction of the petitioner by finding that the trial court did not err in denying petitioner's motion for discovery, and while it was error to deny petitioner's question on *voir dire*, such error was not reversible (see Appendix A to Petitioner's Brief).

Transfer on certification was denied by the Court of Appeal, State of California, Fourth Appellate District, Division One.

SETTLED STATEMENT OF FACTS ON APPEAL

On December 23, 1975, prior to the selection of the jury, defense counsel moved for disclosure of the District Attorney's Jury Book.[1/] A similar motion was made by defense counsel on December 17, 1975, before the Honorable Donald W. Smith, of the El Cajon Municipal Court, prior to the retrial of *People v. Lynn Orla Simpson*. On December 17, defense counsel stipulated to the Deputy District Attorney's description of the Jury Book, a list of the prior verdicts of the current panel maintained exclusively by the Deputies District Attorney assigned to the El Cajon Branch Office. Occasionally, the trial deputies will include comments made by the trial jurors during voir dire examination or during the discussion of a prior case after the verdict has been returned.

1/ The Settled Statement of Facts on Appeal was prepared and submitted to the Appellate Division of the Superior Court of the State of California, for the County of San Diego, pursuant to California Rules of Court, Rule 184.

Prior to the voir dire of the jurors, counsel for the defendant moved for an order compelling discovery of the Jury Book compiled and held by the El Cajon Office of the San Diego County District Attorney. The particular Jury Book sought by the defendant was similar to those which are routinely prepared by the Deputies District Attorney in El Cajon. The Jury Book is a notebook which contains information on each member of the current jury panel. The information on each member compiled in the book is contributed by each Deputy District Attorney, and the information is used by each in selecting future juries from the same panel.

For each juror, the Jury Book will generally indicate the trials on which the juror has sat and the verdicts reached, and information which a Deputy District Attorney has learned by talking with the jurors after a verdict has been returned. The recorded information typically includes observations of the jurors' attitudes, in addition to the substantive facts communicated to Deputies District Attorney by the jurors.

Both counsel in this case had in a prior trial involving another defendant argued the merits of a motion made by defendant for discovery of the Jury Book. By stipulation of counsel, the motion in the present case was based upon a copy of the transcript of the earlier argument. A copy of that transcript is attached to this Settled Statement as Exhibit "A".

The Court also denied the defendant's alternative motion for a continuance until January, 1976, when a new jury panel would be in effect.

The jury was selected during the morning and afternoon sessions of December 23, 1975. Both counsel stipulated to the general qualifications of the jury panel. The Court examined each prospective juror at length concerning his personal background, friendship with law enforcement officials, any prior relationship or acquaintance with either the Deputy District Attorney or any member of the District Attorney's legal, investigative, or clerical staff, as well as any association with defense counsel or the members of his law firm, prior contact with any person charged with violation of Vehicle Code Section 23102(a), knowledge of any person victimized by a drinking driver, and any personal prejudices against persons who drink and drive. All veniremen were asked if they had served on prior Driving While Under the Influence cases. The Court required those with prior service on such cases to disclose how many cases they had served on and whether the prosecution had presented evidence of a chemical test. These jurors promised that they would not consider any evidence or arguments or instructions on the law presented in earlier cases in deciding the guilt or innocence of the defendant.

During voir dire, counsel for defendant asked jurors the following question to which the Deputy District Attorney objected:

> "Have you ever had a conversation with a Deputy District Attorney about a case on which you sat as a juror?"

The objection to the question was sustained by the Court.

One prospective juror, Mrs. Joan Kouns, stated during voir dire that she and her husband were business and social

acquaintances of the defendant. Moreover, she admitted an acquaintance with defense witness Alfred Toston.

The defense did not challenge any prospective juror for cause; several veniremen who had served on Driving While Under the Influence cases were not excused preemptorily. The defendant and the prosecution each exercised only seven preemptory challenges. During the late afternoon of December 23, 1975, Mrs. Kouns and eleven other jurors were impaneled as the petit jury in the instant case.

The prosecution called four witnesses during its case in chief. Deputy Nunn of the San Diego Sheriff's Department testified that on October 18, 1975, at approximately 2:00 a.m., he observed a 1966 Dodge pickup truck travelling erratically on Woodside Avenue in Lakeside. The vehicle weaved from one side of the ten foot lane to the other. On several occasions, he noted the vehicle crossed over the center divider separating eastbound and westbound traffic. Once the vehicle nearly struck a guard rail on the right side of the roadway. Deputy Nunn recalled that the tires of the passenger side of the vehicle touched the dirt shoulder abutting the roadway. After stopping the vehicle and contacting the driver, Kermit G. Heise, Deputy Nunn detected a strong odor of an alcoholic beverage on the defendant's breath. The defendant's speech was slurred, and he staggered when exiting his vehicle. When Mr. Heise walked, he used the vehicle for support. In Deputy Nunn's opinion, the defendant was under the influence for purposes of driving an automobile.

California Highway Patrol Officer Ferguson testified that he arrived at the scene at approximately 2:25 a.m. to assist

Deputy Nunn. He found the defendant unsteady on his feet and noticed that Mr. Heise's speech was impaired. At the officer's request, the defendant performed a series of field sobriety coordination tests which he failed. The defendant told both officers that he suffered from a back ailment and epilepsy. He admitted to consuming "a few beers" prior to driving. Officer Ferguson testified that defendant was under the influence when Deputy Nunn placed him under arrest.

Deputy Sheriff Larson testified that at 4:00 a.m. on October 18, 1975, he administered a breath test to the defendant on a Gas Chromatograph Breath Intoximeter at the San Diego County Jail. Prior to October 18, Deputy Larson had completed a course of instruction in the operating procedure of the intoximeter offered by the criminalists of the San Diego County Sheriff's Regional Crime Laboratory. A blank test registering .002 was run preliminarily, and the test results of the defendant's breath samples were .125 and .124 respectively.

Mr. Robert Eckhaml, a forensic alcohol supervisor employed by the Sheriff's Crime Laboratory, testified as to the scientific principles and operation of the breath intoximeter. On October 16 and October 20, a known standard solutions of alcohol were tested on the machine used by Deputy Larson and the readings were accurate within the tolerances permitted by Title 17 of the California Administrative Code. The .002 reading of the blank sample was negligible and complied with statutory requirements. Relying upon personal experiments and his readings of numerous other studies regarding the effects of alcohol at known levels on the ability of human beings to drive a vehicle, Eckhaml opined that all persons with a blood

alcohol of .10 or above are under the influence for purposes of driving a motor vehicle.

The defense presented five witnesses at trial. Mr. Alfred Toston, a friend of the defendant for many years, testified that he ate lunch at Pecos Bill's Bar located in Lakeside during the noon hour of October 17. From 3:00 p.m. on October 17 until 1:00 a.m. on October 18, he continually drank alcoholic beverages at Pecos Bill's. Toston first observed the defendant arrive at the bar at 8:00 p.m. They both ate dinner and remained at the bar until 1:00 a.m., when they travelled to the Lakeside Hotel. Leaving the hotel shortly before 2:00 a.m., Toston was the front seat passenger of Mr. Heise's vehicle at the time of the stop. While admitting his own intoxication and his inability to recall how many drinks he personally imbibed, Mr. Toston recalled that defendant consumed two vodka drinks at dinner and two vodka drinks at the Lakeside Hotel. In his opinion, the defendant was not under the influence at the time of his arrest.

The defendant testified that he is 64 years old and that his business is the drilling and installation of wells. On October 17, 1975, he worked from 7:00 a.m. to 8:00 p.m. installing a well. During this period of time, he did not drink any alcoholic beverages and ate lunch with his helper, Bobby Joe Lowe, at the job site. Mr. Heise testified that he never drinks beer and therefore could not have told the officers that he had consumed "a few beers." In addition, he admitted feigning epilepsy, because he did not want to go to jail. While denying that his vehicle weaved on the roadway, he claimed that his pickup truck has an inherent defect which causes the vehicle to wander on the road. Moreover, the steering

defect had been checked on numerous occasions at Cunningham's Garage in El Cajon. The last time the faulty condition had been inspected prior to trial was early December, 1975. He denied that he was under the influence of intoxicating liquor, stating he only drank four vodka tonic drinks between 8:00 p.m. and 2:00 a.m.

Mr. Bobby Joe Lowe testified that on October 17, 1975, he assisted Mr. Heise in installing a well pump. At noon, both individuals ate lunch at Pecos Bill's. However, he did not see Mr. Toston at that establishment. The defendant did not drink any alcoholic beverages in Mr. Lowe's presence, but he has observed Mr. Heise drink beer on numerous occasions. He recalled that he drank beer within a week of his arrest.

Mr. John Woodward testified that he is a forensic chemist familiar with the operation of the breath intoximeter and that he has serviced and operated similar machines. In his opinion, the presence of .002 alcohol in the blank sample indicated that the machine was not performing accurately; therefore, the accuracy of the defendant's breath reading was suspect. However, he admitted that he was favorably impressed with the methodology and the procedures employed by the San Diego Sheriff's Regional Crime Laboratory in the administration of its blood alcohol program. In his opinion, some persons are not under the influence between .10 and .13 blood alcohol levels.

Mr. Thomas Zelesky testified that he is the service manager at Cummingham Motors, that he never saw the defendant or his vehicle prior to December 22, 1975, when he was asked to examine the steering mechanism. While test driving the vehicle, Zelesky discovered a one-to-two inch play in the steering mechanism causing the vehicle to wander one

to two feet on the roadway. However, he did not experience any problem maintaining the vehicle in its proper lane while driving on narrow streets in the City of El Cajon.

The trial ended on the afternoon of December 26. On December 29, 1975, after two hours of deliberation, the jury returned a guilty verdict.

ARGUMENT

I

THERE IS NO CONFLICT OF DECISION

It has long been held that the contents of the prosecutor's jury book are not subject to discovery by defense counsel. *People v. Superior Court* [*Nelson*] (1959) 175 Cal.App.2d 830, 1 Cal.Rptr. 55; *People v. Brawley* (1969) 1 Cal.3d 277, 82 Cal.Rptr. 161, 461 P.2d 361; *Best v. United States* (1950) 184 F.2d 131, cert. den. 340 U.S. 939, 71 S.Ct. 480, 95 L.Ed. 677, reh. den. 341 U.S. 907, 71 S.Ct. 607, 95 L.Ed. 1345; and, *Hamer v. United States* (1958) 259 F.2d 274, cert. den. 359 U.S. 916, 79 S.Ct. 592, 3 L.Ed.2d 577, reh. den. 359 U.S. 962, 79 S.Ct. 799, 3 L.Ed.2d 769.

At this point it is appropriate to note what constitutes the District Attorney's jury book. In petitioner's Exhibit A before the Appellate Division of the Superior Court and a part of the Record on Appeal, is the following description of the jury book from the testimony of Deputy District Attorney Horwick:

> "MR. HORWICK: . . . But here is how it is done: As I understand, the two jury panels sit at all times for a certain length of time, I

believe the court said for 45 days. Well, when the new jury panels are called we have a book, a very simple book you don't have to be a lawyer to understand it. And there are boxes similar to the tic-tac-toe boxes that we all utilized growing up. And the name of each juror is at the top of each box, alphabetically, A. B. C. D. and so forth. And then we record whenever possible -- not always, but almost always -- whether that juror sat on a case, the charge, the outcome, guilty, not guilty or hung jury; and perhaps something about the case, not what the juror says, but something about the case, for example most of our cases that go to trial seem to be drunk driving cases, so we might note the blood alcohol. If it is a not guilty we might say 'weak case,' to indicate, well, maybe it was not an unexpected verdict, or we might indicate sometimes the approximate amount of time of the verdict, or whether it was a strong case, or whether something particular came up. It is conceivable that sometimes we might include something the juror says after the case is over. But my experience has been that is very, very rarely the case. And usually if there is any statement made in there, any evaluation of the juror, it is strictly based on the Deputy D. A.'s own subjective view of something the juror may have said during voir dire in response to a question by the defense counsel, the judge or the D. A. himself. That is essentially our book."

At the hearing upon petitioner's motion for discovery of the jury book before the trial court, it was well explained that there had been efforts made by petitioner's trial counsel as

well as others to perfect a system of juror reporting so that the same information would have been available to all defense trial counsel. However, due, apparently to economic reasons and the lack of concerted interest, the project failed.

A substantial amount of the information sought by petitioner is available as public record. Likewise, should counsel desire, he could inquire of the bailiff or the clerk or other defense counsel. The issue, then, is not the prosecutor's diligence, but trial counsel's lack of diligence.

Petitioner argues that the jury book contains information which is the result of conversations with jurors after the rendition of a verdict. Petitioner has, however, overlooked the acknowledgment of his trial counsel upon hearing on his motion for discovery in the trial court:

> "MR. MELOCHE: . . . I have indicated also that I have talked to jurors after cases myself, and I have observed the practice and know it to be common practice, and after almost every jury trial; in fact, every trial that I have practiced in out in this area there has always been a discussion of the matter with the jurors after the case is over." (Petitioner's Exhibit A on Appeal before the Appellate Division of the Superior Court).

The decision in *Dennis v. United States* (1966) 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973, is inapplicable to the case at bar as it deals with the discovery of a witness' testimony given before a grand jury at the time of trial.

II

ERROR IN FAILURE OF TRIAL COURT TO ALLOW A SINGLE VOIR DIRE QUESTION POSED BY PETITIONER'S TRIAL COUNSEL WAS NOT, UNDER THE FACTS OF THE CASE, SO PREJUDICIAL AS TO REQUIRE REVERSAL OF THE VERDICT RENDERED

Respondent yet contends that the denial of the single voir dire question was not error by the trial court under applicable California Statutes. Reference is made to California Penal Code Sections 1072, et seq., setting forth the grounds for a challenge for cause. However, respondent recognizes that the court below found such ruling of the trial court to have been erroneous yet also finding such error not to be reversible.

The rationale for that ruling can be found in the effort of the trial judge to inquire of the prospective jurors of their prior relationship or acquaintance with the prosecutor or any member of the District Attorney's staff. In fact, a juror who had an association with the petitioner at least socially and was acquainted with one of petitioner's witnesses remained on the jury to try the case. Nor can one overlook the dedication of the jurors to their task in their review of the evidence during a traditional Holiday Season. Deliberations proceeded for two hours to verdict which is certainly antithetical to a "prosecution-prone" jury.

Nor can it be said that petitioner's trial counsel was foreclosed from effective voir dire as each counsel participated in the examination of the veniremen. Neither the prosecutor nor petitioner's trial counsel exhausted their preemptory

challenges. Indeed, several prospective veniremen who had served on Driving Under the Influence cases were not excused.

Upon review of the evidence and testimony presented by both respondent and petitioner, and in view of the conflicts in testimony of the petitioner and witnesses called by him at trial, the error in denial of the single voir dire question cannot be said to be so prejudicial as to require reversal.

Petitioner has chosen to look upon this case at bar from an oblique angle, arguing that fundamental unfairness is existent by the prosecution's discussion of a concluded case with excused jurors while overlooking the fact that his trial counsel admitted of the same practice in almost every case.

Facts in every case differ as do the parties. Different pressures, feeling and sympathies come into play. As these factors vary so do the verdicts of the jury who determine the case. Petitioner, upon the record of the case below, did receive an impartial and fair trial. *People v. Crowe* (1973) 8 Cal.3d 815, 106 Cal.Rptr. 369, 506 P.2d 193.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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